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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DEE-K ENTERPRISES, INC. and
ASHEBORO ELASTICS CORP.,
Petitioners,

v.

HEVEAFIL SDN. BHD., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. To satisfy the Sherman Act's restraint of trade requirement, do plaintiffs who prove a mixed U.S.-foreign price fixing cartel have the option to show that cartel members or their agents made non-minimal sales in or into U.S. interstate commerce or engaged in other implementing acts here, or must plaintiffs separately prove the cartel's "substantial effect on U.S. commerce" whenever the scheme is judicially deemed to have been "primarily foreign"?

2. Assuming that proving a substantial effect on U.S. commerce is necessary even in cases involving price fixing by U.S. and foreign firms selling in interstate commerce through U.S. sales outlets, is the substantial effect issue subject to jury determination when multimillion dollar U.S. interstate sales by defendants of the relevant product are undisputed?

PARTIES TO THE PROCEEDING

Petitioners
Dee-K Enterprises, Inc.
Asheboro Elastics Corp.

Respondents
Heveafil Sdn. Bhd.
Filmax Sdn. Bhd.
Filati Lastex Sdn. Bhd.
Rubfil Sdn. Bhd.
Rubfil USA, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Dee-K Enterprises, Inc. and Asheboro Elastics Corp. state the following:

Dee-K Enterprises, Inc. has no parent company. Dee-K Enterprises, Inc. is not publicly held, and there is no publicly held company that owns 10% or more of its stock. Asheboro Elastics Corp. has no parent company. Asheboro Elastics Corp. is not publicly held, and there is no publicly held company that owns 10% of its stock.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fourth Circuit (App. 1a-27a) is reported at 299 F.3d 281. The order of the U.S. District Court for the Western District of North Carolina denying Petitioners' motion for a new trial (App. 28a-31a), and the order of the district court entering judgment for Respondents (App. 32a-33a) are not published. The district court's bench rulings on jury instructions (App. 34a-38a) are not published.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 30, 2002. Jurisdiction in this Court is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT

This is a case where U.S. companies that purchased extruded rubber thread ("ERT"), a component of elastic,

from outlets in North Carolina secured a jury special verdict that the U.S. and Asian firms that sold them rubber thread met overseas and fixed the prices of that product, with intent to affect the U.S. market. App. 7a. It was undisputed that such firms sold large amounts of that product in U.S. interstate commerce, usually out of their own U.S. branches and subsidiaries. Respondents nevertheless convinced the trial court, over vigorous objection, that this Court's recognition in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), of the relevance of a "substantial effect on commerce" test in "foreign conduct" cartel cases required a jury finding of "substantial effect" in this case because it involved offshore price fixing meetings. In the trial court's view, the jury's negative verdict on the substantial effect question necessitated complete exoneration of the price fixers. The Fourth Circuit affirmed, on the novel rationale that regardless of the extent of U.S. activity in furtherance of a conspiracy, the balance of offshore versus U.S. conduct can require a substantial effects verdict. The issue thus remains whether the contested jury instructions and related special verdict form that allowed U.S. and foreign price fixers to escape all liability to their U.S. customers correctly stated the law of Sherman Act commerce jurisdiction.[1]

1. Petitioner Dee-K Enterprises, Inc. ("Dee-K") is a Virginia textile firm that bought extruded rubber thread from the North Carolina branches and subsidiaries of foreign-owned rubber thread producers. Dee-K and another U.S.

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[1] The opinion below speaks of jury instructions and special verdicts here not being overturned because not an abuse of discretion, App. 8a; but a significant error of law is always an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").

firm, Asheboro Elastics Corp., brought suit against Malaysian, Indonesian, and Thai rubber thread producers, and the Malaysian firms' U.S. subsidiaries, seeking damages and injunctive relief for price-fixing in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. App. 4a. Jurisdiction in the district court was based on 28 U.S.C. §§ 1331 and 1337(a).

In their answer to the complaint, Respondents admitted the existence of their sales and sales outlets in the United States. The record showed that at least three of the respondents obtained licenses to do business in North Carolina. The two lead price fixers, Mr. Baba of Heveafil and Mr. Jayabalan of Rubfil, served as presidents of a U.S. branch and U.S. subsidiary, respectively. Mr. Baba and other price fixers such as Rubberflex imposed the cartel prices on their U.S. branches as retail prices. C.A. App. 2171, 2181, 2220. The agreed-upon prices were thus charged by Respondents to Petitioners and other customers in domestic transactions.

Two conspirators testified at trial in support of Petitioners' case, and they also provided minutes of the cartel meetings. Respondents chose to provide no witnesses or documents regarding the price fixing meetings. The jury found that each of the respondents did engage in a conspiracy aimed at fixing prices for ERT in the U.S. market. App. 7a.

The Fourth Circuit did not upset the jury's finding that Malaysian producers, later joined by producers from Indonesia and Thailand, met regularly between 1992 and 1995 in Asia to fix prices. As the appeals court summarized:

> Dee-K alleged (and proved to the jury) a largely foreign conspiracy with some domestic elements, aimed at a global market including, but certainly not limited to, a United States import market. Indeed, the conspiracy mixed foreign and domestic elements in several respects: it included many *participants* with foreign affiliations but a few who also had United States

> affiliations; *acts* that range from a series of conspiratorial meetings, all held abroad, to routine communications, a few with the United States; and a *target market* embracing dozens of nations including the United States.

App. 10a. The opinion also acknowledges that the Malaysian respondents sold ERT through U.S. branches and subsidiaries, or directly to some U.S. customers, App. 6a, and secured higher prices in the United States during the conspiracy than before it. App. 6a-7a.

Other evidence of record at trial not noted in the opinion include that (i) undisputed Government data showed U.S. imports of over 59 million pounds of ERT during the cartel period (C.A. App. 3389), sold at increasing prices ranging from $1.10/lb. to $1.80/lb (C.A. App. 2152); (ii) respondent Heveafil's internal reports show that during 1994, the middle year of the cartel, Heveafil's U.S. sales exceeded $7 million and it made more profits in the United States than in any other country in which its ERT was sold. (C.A. App. 2185, 2177).

2. The parties were in sharp disagreement concerning jury instructions and need for special verdicts. Respondents were granted, over Petitioners' objection, instructions stating that the jury must find price fixing aimed at the United States, plus sales in U.S. interstate commerce, plus a substantial effect on U.S. commerce, which effect could not be presumed. Respondents also were granted, over objection, a set of special verdicts under which the jury, having found price fixing aimed at the United States, also had to find that such price fixing had a substantial effect on U.S. commerce. The basis for Respondents' position was this Court's observation in *Hartford Fire* that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." 509 U.S. at 796

(citing *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*")).

Petitioners objected that Respondents' interstate sales of the price fixed product out of their own U.S. outlets obviated the need for a *Hartford Fire/Alcoa* "substantial effect on commerce" instruction or verdict, and they submitted a brief relying on a line of rulings allowing plaintiffs to prove either restraint of interstate commerce or effect on commerce. Alternatively, Petitioners objected to inclusion of the word "substantial" in any effect test and to the trial court's refusal to tell the jury that minimal proof of effect will suffice in a case involving direct price fixing of goods sold in the flow of U.S. commerce. App. 36a-38a. Petitioners offered alternative instructions that included no effects test and instructed that Respondents' involvement in U.S. interstate ERT commerce was undisputed. Petitioners' proposed instructions were rejected, over objection.

The trial court instructed the jury as follows in regard to the commerce issue (C.A. App. 1352-53):

> Plaintiffs must also meet their burden of proving that the alleged agreement between the Defendants in fact produced a "substantial effect" on the U.S. market. A substantial effect in the United States cannot simply be assumed. Nor can a substantial effect in the United States be assumed to continue because it once existed. The Plaintiffs must prove that the substantial effect requirement is met at the relevant time.

Rather than disputing the volume of interstate sales, Respondents' counsel asked the jury to find no substantial effect on grounds that the Malaysian respondents' 1992 loss in a U.S. antidumping case and exposure to a 1994-95 latex price surge were the true causes of U.S. price increases even

if there was price fixing.[2] Thus instructed, the jury found no substantial effect on the United States, whereupon the trial court entered judgment in Respondents' favor, without allowing the jury to render a verdict on damages.

The five respondents who stood trial were relieved of liability due to the special verdict requiring a finding of substantial effect on commerce. App. 7a. (Some of the original defendants did not appear, and default judgments were entered against them.) One respondent and defendant below, Rubfil USA, was incorporated in North Carolina. A second, Heveafil Sdn. Bhd., sold in the United States through a North Carolina branch office headed by a managing director of the parent company. The other respondents and defendants at trial were Malaysian producers that sold ERT to U.S. customers through wholly owned U.S. subsidiaries. At least three respondents, including Heveafil, were licensed in North Carolina to sell ERT.

3. After trial, Petitioners moved for JMOL or a new trial, contending firstly that U.S. based firms are not entitled to *Alcoa* substantial effect instructions. Petitioners renewed their position that an effect verdict is not legally required where U.S. sales of the price-fixed product are undisputed. Petitioners also contended, as to the substantial effect issue, that the undisputed $50 million plus in imported ERT, combined with a 40% price increase over five years, and a

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[2] Respondents also contended that higher list prices set from abroad by cartel leaders were sometimes discounted in the United States, but the appeals panel did not seize upon that point, perhaps because of Petitioners' evidence (C.A. App. 2215-17) that higher prices were achieved more than 80% of the time. In any event, individual discounting from fixed prices is not a defense of Sherman Act liability. *Plymouth Dealers' Ass'n v. United States*, 279 F.2d 128 (9th Cir. 1960).

more than 50% market share held by the price fixers, established substantial effect conclusively as a matter of law or fact, requiring that the jury's special verdict to the contrary be overturned. App. 7a, 28a. The trial court denied the motions, citing *Hartford Fire* as controlling authority justifying the instructions and necessitating a positive substantial effects verdict as a condition of liability. App. 29a.

4. On appeal, Petitioners argued that a *Hartford Fire* substantial effect instruction or finding is needed only for cartels that do not fix the prices of goods sold in U.S. interstate or import commerce, and is not available to cartels with U.S. participants who sell the products in U.S. markets. App. 15a. Further, Petitioners contended that the instructions and special verdict were unsound in not allowing Petitioners to prevail by either proving price fixing in commerce *or* price fixing that affected commerce. App. 8a.[3] Lastly, Petitioners contended that, even if a substantial effect test were applicable, the undisputed evidence as to Respondents' sales, market share and price increase figures, combined with the jury's finding of targeted price fixing, established substantial effect, and thus substantial effect was not an issue for the jury. App. 7a-8a n.1.

Respondents argued that the need for a substantial effect test arises whenever the price fixing meetings are held abroad, even if the fixed prices are charged by the conspirators' agents in the United States. App. 23a. In regard to the substantial effect test, Respondents contended

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[3] For this point, Petitioners relied on this Court's holding in *Continental Ore Co. v. Union Carbide Carbon Corp.*, 370 U.S. 690, 709 (1962), that it is reversible error to instruct a jury that a plaintiff can prevail only on one antitrust theory when the law allows a plaintiff to prevail on either of two theories.

that no legal presumption or conclusion of substantial effect was applicable when evidence of other causes of U.S. price increases was presented. App. 7a-8a n.1.

The court below, in deciding the substantial effects issue, expressly refused to follow the teaching of the Third and First Circuits that *Hartford Fire*'s test applies only when the cartel conduct is "wholly foreign." *See Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 52, 75 (3d Cir. 2000); *United States v. Nippon Paper Indus.*, 109 F.3d 1, 9 (1st Cir. 1997). The Fourth Circuit explained that the other courts of appeals "did not state or suggest the origin of the phrase 'wholly foreign.'" App. 16a.

The Fourth Circuit concluded that the proposition that the "substantial effects" test applies only to wholly foreign conduct was "severely undercut" by *Hartford Fire* itself for two reasons. First, this Court "*never* described the conduct before it as 'wholly' foreign." App. 18a. Second, "'wholly foreign' cannot be an appropriate characterization of the transactions at issue in *Hartford Fire* itself – which involved a refusal to sell to United States consumers." App. 17a. The Fourth Circuit expressly rejected Petitioners' contention that U.S. overt acts in furtherance of *per se* illegal price fixing obviate the need for a substantial effect test. App. 15a-16a. Claiming that "neither the statutory scheme nor the case law provides clear guidance" regarding standards governing "mixed" cartels involving U.S. and foreign actors and acts, App. 10a, the Fourth Circuit ruled that all participants in a mixed U.S.-foreign cartel are entitled to a substantial effect test whenever it is judicially determined that the scheme was "primarily foreign." App. 25a. The Court of Appeals then concluded that because most of the conspirators were foreign owned, the price-fixing meetings were held in Asia and prices were fixed in non-U.S. as well as U.S. markets, the scheme was "primarily foreign." App. 26a-27a. Without discussion of the more than $50 million in U.S. sales, or the

31 states in which Heveafil sold ERT (C.A. App. 2179), it concluded that the U.S. aspects of the conspiracy were "mere drops in the sea of conduct that occurred in Southeast Asia." App. 26a.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Is Directly Contrary To This Court's Precedent

This Court held in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980), that to satisfy the Sherman Act commerce requirement, a price-fixing plaintiff must "demonstrate by submission of evidence beyond the pleadings that the defendants' activity is itself in interstate commerce *or* . . . that it has an effect on some other appreciable activity demonstrably in interstate commerce." 444 U.S. at 242 (emphasis added). The opinion notes that a substantial interstate market in price-fixed goods satisfies the in commerce test. The Court went on to stress that in a civil action under the Sherman Act, even a plaintiff who proves a conspiracy aimed at U.S. commerce that causes no measurable damage still proves all elements of the offense and is at least entitled to injunctive relief. *Id.* at 243. The opinion cites *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 123-25 (1969), an international cartel case, for this proposition. *See* 444 U.S. at 243.

The *McLain* opinion nowhere holds, or in any way suggests, that proof of price fixing involving goods sold in U.S. interstate commerce is unavailing if the price fixers are foreign owned, or meet offshore, or fix prices for non-American markets also. The Fourth Circuit says, however, that the *Hartford Fire* reference to the *Alcoa* effects test limited *McLain*'s rule in this way. App. 14a. But the *Hartford Fire* comment should not be read as cutting back *McLain* to aid mixed U.S.-foreign cartels. The issue in *Hartford Fire* was comity, not the commerce requirements of

the Sherman Act. *Hartford Fire* did not deal with price fixing, or mention *McLain*, or opine whether plaintiffs there might have satisfied an "in commerce" standard as well as an "affecting commerce" standard.

The Fourth Circuit's treatment of mixed U.S.-foreign cartels is contrary to countless rulings of this Court. For instance, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962), the Court stated, "[a] conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries." (citing *United States v. American Tobacco*, 221 U.S. 106 (1911); *Thomsen v. Cayser*, 243 U.S. 66 (1917); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927)). None of these cases suggests that it would be relevant to estimate the percentage of cartel activity that occurred abroad rather than in the United States. All hold that once it is proved that the conspiracy included products or services sold in the United States, the commerce inquiry is complete.[4] Plainly, when this Court in *Hartford Fire* referred to a "well established" substantial effect test, it was not suggesting a test whose scope would run afoul of so many precedents.

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[4] Section 1 of the Sherman Act states clearly that it bans conspiracies to restrain "trade or commerce among the several states *or* with foreign nations." 15 U.S.C. § 1. In 1982, Congress amended the Sherman Act to place a substantial effect test in the statutory text. That test, however, applies only to export commerce; Congress expressly excluded import commerce from the substantial effect requirement, and the law makes no mention of cases involving restraint of interstate commerce. Foreign Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246 (codified at 15 U.S.C. § 6a).

The opinion below concludes that because *Hartford Fire* mentions jurisdiction based on "some substantial effects" in a case that involved some counts that were not purely foreign, that opinion mandates an effects test in all primarily foreign cartel cases. App. 14a, 18a. Examination of the text further shows that this is a misreading of the intent of the Court's brief comments. The *Hartford Fire* opinion cites *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*"), *Matsushita Electric Industries v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Restatement of Foreign Relations Law § 415 (1987), and the Areeda treatise, *Antitrust Law*, as sources of the effects (or substantial effects) test. 509 U.S. at 796. None of these references supports the Fourth Circuit's ruling. *Alcoa* itself teaches that an effects test is unnecessary where territorial bases for jurisdiction exist, as where the cartel sent agents to the United States to commit acts in furtherance of the scheme. *See* 148 F.2d at 443. Further, *Alcoa* limits its rule only to firms owing no allegiance to the United States. The Fourth Circuit extends *Alcoa* rule protection to firms based or licensed to do business in the United States.[5] Where, as here, intent to affect the United States is proved, *Alcoa* does not require that plaintiffs establish a substantial effect on commerce, but rather puts the burden of showing no effect on commerce on defendants. *Id.* at 444.

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[5] The Areeda treatise, contrary to the Fourth Circuit, states that "foreign restraints . . . would not necessarily be immune when American firms participate in the restraint. . . ." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272e at 354 (2d ed. 2000). *See also United States v. Nippon Paper Indus., Inc.*, 62 F. Supp. 2d 173, 192-93 (D. Mass. 1999) (*Hartford/Alcoa* rule is for foreign firms).

In *Matsushita,* the defendants' lack of effect contention had been rejected at trial by Judge Becker, when he held that the issue was for the court, was easily satisfied and was unavailing where, as there and here, the foreign members of the cartel conspired with or directed U.S.-based firms, such as sales subsidiaries. *See Zenith Radio Corp. v. Matsushita Elec. Indus.*, 494 F. Supp. 1161, 1186 (E.D. Pa. 1980).

Restatement § 415(1) states that if "significant" (not predominant) aspects of the conspiracy occur in the United States, no effects test is necessary. Section 415(3) indicates that a substantial effects test is needed only where no acts in furtherance take place on U.S. soil. Restatement (Third) of Foreign Relations at 283 (1987). The Areeda treatise similarly states that even "incidental" U.S. events support territorial jurisdiction. Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272(b) at 351 (2d ed. 2000).

The majority opinion in *Hartford Fire* noted that Sherman Act commerce jurisdiction was conceded, and then remarked that even the conduct of English corporations in England would meet an *Alcoa* effects test due to the aiming at the United States and the volume of commerce. 509 U.S. at 795-96. That comment in no way suggests that the Court would have barred plaintiffs from proving overt acts on U.S. soil as an alternative means of prevailing. Of course, the plaintiffs in the *Hartford Fire* litigation could not prove increased prices in U.S. interstate commerce, because *Hartford Fire* was a case about concerted refusal to sell. This case, by contrast, involves a jury finding of price-fixing of goods sold in U.S. interstate commerce, which the record shows were sold at increased prices.

Thus, the Fourth Circuit's decision rests on the dubious assumption that this Court has *sub silentio* weakened earlier, clear bedrock opinions on a key subject such as U.S. antitrust prosecution standards.

Essentially, the Fourth Circuit's balancing test between the U.S. and foreign aspects of a cartel uses an overbroad reading of the effects test to bring back the comity balancing test that was rejected in *Hartford Fire* itself. It is well settled that Congress intended its commerce power to be fully used, generally and in Sherman Act cases. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194 (1974) (quoting *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558 (1944)). The Fourth Circuit assumes that Petitioners proved enough to establish U.S. interstate commerce jurisdiction over the conspirators if all participants had been Americans who met locally. Use of its test, however, allows possible "jurisdictional" exoneration of price fixers over whom the United States clearly and admittedly had adequate territoriality jurisdiction, measured by U.S. constitutional standards or international law standards. The court below does not explain why U.S. plaintiffs have higher burdens of proof because of the foreign ownership of conspirators, or their choice to have offshore meetings or to direct price fixing at many nations. The Fourth Circuit balancing approach thus creates an unjustified surrender of wholly legitimate jurisdiction, something this Court declined to do in *Hartford Fire*.

Lastly, as Petitioners argued in their motions for new trial or JMOL, and later in their appeal to the Fourth Circuit, use of the *Alcoa* test at trial was particularly inappropriate because one of the five respondents found to have engaged in price fixing but exonerated on lack of substantial effect grounds was Rubfil USA, a company incorporated in North Carolina. All precedent teaches against such an extension of the *Alcoa* rule. The *Alcoa* opinion itself says that its rule applies when the antitrust laws are to be applied to persons "not in allegiance" to the United States. 148 F.2d at 443. The Areeda treatise likewise says that the foreign policy dangers that led to the *Alcoa* test are far less when a cartel

has American members. Areeda & Hovenkamp, *Antitrust Law* ¶ 272e at 354.

B. The Decision Below Is In Direct Conflict With Rulings Of Other Circuits And With Other Noted Authority

Prior to this case, the First and Third Circuits had been confronted with the question whether the substantial effect test recognized in *Hartford Fire* is applicable to schemes that restrained U.S. interstate commerce or involved overt acts in the United States. Both clearly ruled that it is not.

In *Carpet Group International v. Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000), as here, the plaintiffs' case had been dismissed because of a factual finding that the scheme's effects did not meet the substantial effects test set out in *Hartford Fire*. The Third Circuit, adopting the *amicus* position of the Department of Justice, reversed.

The court framed the issue before it in terms that mirror the issue presented here (*id.* at 73):

> The defendants contend that the plaintiffs must demonstrate a "substantial effect on our domestic commerce to support the exercise of jurisdiction under the Sherman Act. They place primary reliance for this proposition on *Hartford Fire*.... By contrast, the Department of Justice, as *amicus curiae*, focuses on language in other cases that all the plaintiffs need show is that the restraint either interfered with the sale of rugs in interstate commerce or had a "not insubstantial" effect on interstate commerce to invoke Sherman Act jurisdiction.

The Third Circuit then definitively rejected the defendants' argument in terms that are flatly inconsistent with the holding of the Fourth Circuit in this case:

> We reject the Defendants' reliance on *Hartford Fire*, because it dealt exclusively with the extraterritorial

> applicability of the Sherman Act to wholly foreign conduct. . . . All the plaintiffs need demonstrate is "either that the defendants' activity is itself in interstate commerce or . . . that it has an effect on some other activity demonstrably in interstate commerce."

Id. at 75 (quoting *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 242 (1980)).

Similarly, in *United States v. Nippon Paper*, 109 F.3d 1 (1st Cir. 1997), a price fixing case had been dismissed because the price fixed goods were first sold in Tokyo and no overt acts by defendants in the United States were alleged. The First Circuit reversed on the grounds that *Hartford Fire* allows jurisdiction over "*wholly foreign commerce*" that has an intended and substantial effect in the United States. *Id.* at 9 (emphasis added).

This case thus presents a direct conflict between the circuits. The Fourth Circuit's attempt to avoid this conflict is unavailing. The court speculates that *Carpet Group* and *Nippon Paper's* characterization of the *"Hartford Fire"* rule as applying to "wholly foreign" conduct might "simply have been a shorthand description" and could have been *dicta* in *Carpet Group* because the panel there found that the scheme was in fact primarily domestic. App. 17a-18a. The Fourth Circuit then goes on to confront the Third and First Circuits frontally, opining that if those circuits actually meant what they said, they have misread *Hartford Fire* because the *Hartford Fire* opinion never uses the phrase "wholly foreign conduct" and mentions the effects test in regard to a scheme that had some U.S. aspects (in some counts of the complaint). App. 18a. Review by this Court is necessary to resolve the conflict in the circuits and to provide guidance for the lower courts on the meaning of *Hartford Fire* when mixed U.S.-foreign cartels are challenged, something that happens frequently, in cases crucial to the U.S. economy.

The Fourth Circuit's opinion also fails to acknowledge that the American Bar Association's ("ABA") standard antitrust law treatise and other leading commentators support the position of the other circuits. The ABA treatise, *Antitrust Law Developments (Fifth),* describes *Alcoa* as holding that the Sherman Act reaches "agreements entered into *and consummated* outside the United States by foreign companies." The treatise further summarizes the holding as an "assertion [of Sherman Act jurisdiction] over *wholly foreign conduct.*" *Antitrust Law Developments* 1116-17 (American Bar Association, 5th ed. 2000) (emphasis supplied).

The Areeda and Hovencamp antitrust law treatise similarly states that jurisdiction over a foreign-based cartel "can generally be established simply by showing that the price fixing exists and that a substantial number of sales were made to United States buyers." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 273 at 371 (2d ed. 2000).

The Fugate treatise, cited by the Fourth Circuit (App. 13a), says that the *Alcoa* test is needed for restraints "which are *not* in the flow of foreign commerce." 1 Wilbur L. Fugate, *Foreign Commerce and the Antitrust Laws* § 2.12, at 82 (5th ed. 1996) (emphasis supplied). But the restraint in this case was price fixing of goods that were shipped directly to the United States in the flow of import commerce and then sold to plaintiffs, at elevated prices, in the flow of interstate commerce. The quoted language from Fugate thus supports plaintiffs' position regarding the applicability of the substantial effects test, not the Fourth Circuit's.

Seeking to deny that its novel jurisdictional "test" is unprecedented, the Fourth Circuit asserts that "courts have consistently required a showing of effect on United States commerce even in cases involving price fixing on imports." App. 21a. The opinion seeks to rely primarily on supposed facts of the Uranium Cartel litigation, *In re Uranium*

Antitrust Litigation, 617 F.2d 1248, 1254 (7th Cir. 1980), but it misstates and misperceives the facts of *Uranium*. App. 21a, 26a. In that case, U.S. law *prohibited* the purchase for domestic use of foreign uranium, in order to protect the domestic industry. *See In re Uranium Indus. Antitrust Litig.*, 458 F. Supp. 1223, 1225 (Panel on Multidistrict Litigation 1978). Thus, there were no imports in the *Uranium* case, and an effects test was appropriate. The *Uranium* opinion cited by the panel actually notes that the plaintiff was not a direct purchaser from the conspirators. *See* 617 F.2d at 1263.

The opinion below also mentions *Nippon Paper*, but in that case, it was stressed that "[t]his case does not involve overt acts by co-conspirators occurring in the United States." *United States v. Nippon Paper Indus. Co.*, 944 F. Supp. 55, 64 (D. Mass. 1996). Unlike in this case, the defendants in *Nippon Paper* included no U.S.-based firms, and defendants made no direct sales of the product at issue (fax paper) in U.S. commerce. In fact, neither *Uranium* nor *Nippon Paper imposed* an *Alcoa* test on plaintiffs. In *Uranium*, plaintiffs chose to rely on an effects theory. In *Nippon Paper*, the district court allowed the Government to try to prove either overt acts in U.S. commerce or effect on U.S. commerce. *See* 62 F. Supp. 2d 173, 183 n.29 (D. Mass. 1999). There is simply no support for the Fourth Circuit's jurisdictional rule in any prior precedent.

C. The Decision Below Will Have Pernicious Effects On The Enforcement Of U.S. Antitrust Laws Against Foreign And U.S. Firms That Meet Abroad And Form Cartels To Be Implemented By Their Agents In The United States

The Fourth Circuit's decision is an interpretation of the Sherman Act, and its principles are as applicable to government antitrust enforcement actions as they are to private antitrust suits. The court's decision to impose an

Alcoa burden on plaintiffs in mixed cartel cases is pernicious for both kinds of antitrust enforcement, for numerous reasons:

1. This case is the first decision to accord *Alcoa* rights to firms based or incorporated in the United States.
2. It is the first decision to accord *Alcoa* rights to foreign persons who conspire with firms based or incorporated in the United States.
3. It is the first decision to hold that firms that arrange multi-million dollar price fixes in the United States and in other countries are entitled to more favorable jury instructions than those who price fix only in the United States.
4. It accords foreign-owned firms based and licensed in North Carolina trial rights more favorable than those accorded to purely domestic price fixers.

Lastly, the Fourth Circuit's balancing test is costly and uncertain to apply and creates pressure to allow *Alcoa* instructions for all mixed conspiracies, lest the appellate court reach a different determination of whether the conspiracy is "primarily foreign" or "primarily domestic."

The problems of the balancing test are illustrated by the way the Fourth Circuit counted how many U.S. rather than foreign overt acts occurred. The Fourth Circuit apparently accepted Respondents' argument that the offshore price fixing meetings were virtually the only overt acts of the conspiracy, U.S. overt acts being described in the opinion as only one threat letter plus what are called "routine communications" (*i.e.*, price directives to U.S. outlets). App. 10a. But this ignores the well-settled legal rule that every sale at elevated prices during a price fix is an overt act in furtherance of that conspiracy:

> Antitrust law provides that, in the case of a "continuing violation," say a price fixing conspiracy that

> brings about a series of unlawfully high priced sales over a period of years, "each overt act that is part of the violation and that injures the plaintiff," *e.g.*, each sale to the plaintiff, "starts the statutory period running again."

Klehr v. A.O. Smith Corp., 521 U.S. 179, 189 (1997) (quoting Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 338b at 145 (rev. ed. 1995)).

Thus, in this case, in addition to price directives and threats, there were hundreds, perhaps thousands, of overt acts on U.S. soil. The two petitioners alone provided lists of over three hundred instances in which they were charged elevated prices by Respondents for interstate purchases of the price-fixed goods.

D. Assuming That A Substantial Effect Test Were Applicable, The Decision Below Ignores Clear Precedent That The Substantial Effect Of Price Fixing As To Any Product or Service Sold in Non-Minimal Quantity In Interstate Commerce Is Neither A Jury Question Nor Foreclosed By A Jury's Mistake

The opinion below further holds that the volume of imports or interstate sales (here, over $50 million) does not mandate a finding of substantial effect, but rather that the members of the cartel may escape liability by convincing a jury that other factors (*e.g.*, dumping law, cost increases) might have produced equally high prices. Further, the opinion below rules that such finding by a jury should not be overturned if supported by any evidence. App. 7a-8a n.1.

Petitioners contended in this case, as the United States has in many cases, that where there is no basis for disputing the existence of *non de minimis* interstate sales of the price fixed products, the Sherman Act commerce test is satisfied as a matter of law, and there is no role for a jury to play and no

reason for deference to a jury's mistake. Such rule is well settled.

This Court has held that $190,000 in commerce is substantial. *Fortner Enters. v. U.S. Steel,* 394 U.S. 495, 501-02 (1969). *See also Las Vegas Merchant Plumbers' Ass'n v. United States,* 210 F.2d 732, 748-49 (9th Cir. 1954) (where the jury finds price fixing of goods in commerce, the effect of such price fix is "plainly not for the jury to decide"); *accord Gough v. Rossmor Corp.*, 487 F.2d 373, 377 (9th Cir. 1973) ("The jury's erroneous answer to the jurisdictional interrogatory should have been ignored.") Judge Becker similarly ruled in the *Matsushita* case that the commerce test of jurisdiction is for "the court (not a jury)." *See Zenith Radio Corp. v. Matsushita Elec. Indus.*, 494 F. Supp. 1161, 1177 (E.D. Pa. 1980). *Accord Wirtz v. Lafitte*, 326 F.2d 856, 858-59 (5th Cir. 1968) (holding that it is error to assign the commerce issue to the jury when the effect on commerce is obvious). This Court has held that a supposed factual finding below of no effect on commerce should be reversed whenever the nature of the offense and the commerce makes effect on commerce inevitable. *Burke v. Ford*, 389 U.S. 320, 322 (1947). Similarly, the Areeda treatise states that:

> [O]nce the foreign cartel and actual imports into the United States are found, an effect on United States commerce can be presumed without proof of the amount by which output was reduced or price increased.

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 273b at 372 (2d ed. 2000).

The substantiality question has been discussed in other cases. Judge Lynch of the First Circuit, concurring in *Nippon Paper,* stated that $7 million in sales, the alleged figure there, would certainly be substantial. 109 F.3d at 7. After the ensuing trial, Judge Gertner held that $7 million in annual sales was substantial, but that the plaintiffs were unable to show such sales volume in any year within the

five-year criminal antitrust statute of limitations. 62 F. Supp. 2d at 195. In contrast, the record in this case showed multimillion-dollar U.S. imports and resales in every year of the cartel, four of five of which years were within the four-year civil statute of limitations.

Here, it is undisputed that all respondents sold the price fixed goods in U.S. interstate commerce, that volume of sales exceeded $12 million per year or $60 million during the life of the conspiracy, that Heveafil's yearly interstate sales, in 31 states, exceeded $7 million in some years, and that prices were raised over 40% by agreement. The DOJ/FTC International Guidelines (1995) (cited by the Fourth Circuit at App. 22a) state that such facts would *ipso facto* meet any substantial effect test that was applicable. The Fourth Circuit thus erred in ruling that the commerce issue was properly submitted to the jury and that the district judge was right to defer to the jury's finding of no substantial effect.

To invite a jury to speculate on the substantiality of the effect of a $50 million U.S. price fix by firms with well over 50% of U.S. sales not only goes contrary to decades of cases holding that volume alone is enough, but also inherently imposes on victims of price fixing a burden the Court rejected in a classic international cartel case, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969). There the ruling was that the victim of a cartel has no duty to rebut all other possible causes of his damage. *Id.* at 114 n.9. Moreover, the argument of other causes should have gone only to damages, not to liability. *McLain v. Real Estate Bd. of New Orleans,* 444 U.S. 232, 243 (1980). Lastly, once price fixing was found, the dumping compliance excuse went at most to motive, which is not a defense, *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-10 (1956), *United States v. United States Gypsum Co.*, 333 U.S. 364,

393 (1948), and had already been rejected twice earlier in the case.[6]

CONCLUSION

Enforcement of U.S. antitrust law against international cartels has expanded greatly, resulting in record U.S. law enforcement fines measured per case or per year. *See, e.g.*, Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 Antitrust L.J. 711, 721 (2001). The author, the New York Assistant Attorney General for antitrust enforcement, notes that "enforcement includes not only criminal prosecutions but civil damage recoveries as well. Each has its own particular deterrent effect, of course." *Id.* at 731.

The pernicious effect of the Fourth Circuit's decision is not limited to private antitrust suits, as its principles would apply equally to hamstring government antitrust enforcement. Clearly, the Fourth Circuit ruling can create a major escape hatch from both Government and private anti-cartel cases, especially if followed by circuits that have not yet construed *Hartford Fire*.

The Fourth Circuit's repudiation of the *McLain* rule, conflict with other circuits and complication of effective enforcement against mixed U.S.-foreign international cartels highlight the need for review by this Court.

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[6] In a pretrial ruling made before the case was transferred to the Western District of North Carolina, Judge Ellis rejected two dismissal motions from the Malaysian respondents based on dumping law compliance, noting *inter alia* that U.S. dumping law does not require coordinated or identical pricing and is irrelevant where, as here, a majority of the defendants were from countries that were not subject to any antidumping order. *Dee-K Enters. v. Heveafil Sdn. Bhd.*, 982 F. Supp. 1138, 1155-57 (E.D. Va. 1997).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DEE-K ENTERPRISES, INCORPORATED, a corporation of the Commonwealth of Virginia; ASHEBORO ELASTICS CORPORATION, a corporation of the state of North Carolina, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

HEVEAFIL Sdn. Bhd; FILMAX Sdn. Bhd; RUBFIL Sdn. Bhd; FILATI LASTEX Sdn. Bhd, corporations of Malaysia; RUBFIL USA, INCORPORATED, a corporation of the State of North Carolina, No. 01-1894

Defendants-Appellees,

and

RUBBERFLEX Sdn. Bhd; FILATI LASTEX ELASTOFIBRE USA, INCORPORATED, a corporation of Rhode Island; FLEXFIL CORPORATION OF RHODE ISLAND, a corporation registered to do business in North Carolina; FLEXFIL CORPORATION, a corporation of the state of North Carolina; Pt BAKRIE RUBBER INDUSTRIES; Pt PERKEBUNAN III, corporations of Indonesia; NATURAL RUBBER THREAD COMPANY, LIMITED; LONGTEX RUBBER INDUSTRIES COMPANY, LIMITED, corporations of Thailand; CONSORTIUM INTERNATIONAL CORPORATION, a

corporation of the state of Texas; JPS ELASTOMERICS CORPORATION, a corporation of the state of Delaware,

Defendants.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte.

Graham C. Mullen, Chief District Judge.

(CA-98-10-3-MU)

Argued: May 7, 2002

Decided: July 30, 2002

Before WILKINS and MOTZ, Circuit Judges, and James H. MICHAEL, Jr., Senior United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Motz wrote the opinion, in which Judge Wilkins and Senior Judge Michael joined.

COUNSEL

ARGUED: Joel Davidow, MILLER & CHEVALIER, CHARTERED, Washington, D.C., for Appellants. Christopher M. Curran, WHITE & CASE, L.L.P., Washington, D.C., for Appellees. **ON BRIEF:** Alan I. Horowitz, Michael T. Brady, MILLER & CHEVALIER, CHARTERED, Washington, D.C.; William T. Rikard, Jr., PARKER, POE, ADAMS & BERNSTEIN, L.L.P., Charlotte, North Carolina; Daniel Small, Mary Strimel,

COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C., Washington, D.C., for Appellants. J. Mark Gidley, Jaime M. Crowe, Eric Grannon, WHITE & CASE, L.L.P., Washington, D.C., for Appellees.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

Two United States companies that purchase rubber thread brought this private antitrust action, alleging a price-fixing conspiracy led by Southeast Asian producers of the thread. After an eight-day trial, the jury returned a special verdict, finding that although one or more of the producers engaged in a conspiracy to fix prices that was intended to affect United States commerce, that conspiracy had no "substantial effect" on this country's commerce. The district court then entered judgment on the verdict for the producers. The purchasers appeal, principally contending that the substantial-effect test applies only to "wholly" foreign conduct, and so does not govern this case because the rubber-thread conspiracy resulted in the sale of price-fixed goods directly into the United States. Because the conspiracy involved primarily foreign conduct, we hold that the district court did not abuse its discretion in applying the substantial-effect test. Accordingly, we affirm.

I.

In 1997, Dee-K Enterprises, Incorporated, and Asheboro Elastics Corporation (collectively Dee-K), United States corporations that purchase rubber thread to make elastic fabric, brought this class action, alleging a conspiracy to fix

the price of rubber thread in the United States, in violation of the Sherman Act. *See* 15 U.S.C.A. § 1 (West 1997). Rubber thread, also called extruded rubber thread or elastic rubber thread, and sometimes abbreviated as "ERT," is manufactured in Southeast Asia and used to make elastic fabric, bungee cords, toys, and other products.

Dee-K named as defendants nine Southeast Asian producers of rubber thread and some of their subsidiaries and distributors in the United States. Five of the producers are Malaysian companies: Heveafil Sendirian Berhad, Filmax Sendirian Berhad, Rubfil Sendirian Berhad, Rubberflex Sendirian Berhad, and Filati Lastex Sendirian Berhad. (The suffix "Sendirian Berhad," used in Malaysia and abbreviated "Sdn. Bhd.," translates as "private limited company.") Two are Indonesian: PT. Bakrie Rubber Industries and PT. Perkebunan III. Two are Thai: Longtex Rubber Industries Company, Limited, and Natural Rubber Thread Company, Limited. Dee-K also named as defendants the United States subsidiaries of three Malaysian producers (Rubfil USA, Incorporated, Flexfil Corporation of Rhode Island, Flexfil Corporation, and Filati Lastex Elastofibre USA, Incorporated) and two United States independent distributors used by other producers (Consortium International and JPS Elastomerics).

In its complaint, Dee-K alleged that the members of the class it sought to represent, domestic purchasers of rubber thread, paid "artificially high and non-competitive prices" for rubber thread, that they "were deprived of free and open competition in the market" for rubber thread, and that "competition among defendants" in the United States sale of rubber thread "was restrained." As to injury, Dee-K contended that "plaintiffs . . . purchased substantial quantities of extruded rubber thread from defendants."

Dee-K originally filed this action in the Eastern District of Virginia. Following a number of early rulings not relevant to our disposition of this appeal, the district court determined that venue did not lie in Virginia and transferred the case to the Western District of North Carolina. *See Dee-K Enters. v. Heveafil Sdn. Bhd.*, 985 F. Supp. 640 (E.D. Va. 1997). Prior to trial, that court denied class certification. After most defendants settled, declined to appear, or were dismissed, the case against the five Malaysian producers and the United States subsidiary of one of them (Rubfil USA), none of whom now contest personal jurisdiction, *see Dee-K Enters. v. Heveafil Sdn. Bhd.*, 174 F.R.D. 376 (E.D. Va. 1997), proceeded to trial before a jury.

Dee-K introduced substantial evidence at trial of horizontal price fixing among the producers. This price fixing apparently originated at least in part in reaction to 1991 threats by the United States government to punish Southeast Asian rubber-thread producers for violating antitrust prohibitions against "dumping." "Dumping" occurs when a foreign producer injures a United States producer by selling a product in the United States at less than what would be "fair value" in the foreign producer's home market. *See* 19 U.S.C.A. § 1673 (West 1999) (authorizing an "antidumping duty"). The United States Department of Commerce may impose tariffs on dumpers to bring the United States price into line with the price in the producer's home market. *See id.* Thus, if a product sells for $1 in the home market, it warrants dumping duties if it sells for less than $1 in the United States. Of course, avoidance of dumping penalties in itself does not provide foreign producers with a license to fix prices in violation of United States antitrust laws. Although to avoid dumping a company must price goods at or above the price in its own home market, it may not agree with its competitors to fix prices,

restricting the market movement of prices in the United States market. *See Dee-K Enters. v. Heveafil Sdn. Bhd.*, 982 F. Supp. 1138, 1156 & n.45 (E.D. Va. 1997); *see also United States v. Nippon Paper Indus.*, 62 F. Supp. 2d 173, 180 (D. Mass. 1999) (noting that foreign companies threatened with anti-dumping provisions must "walk a fine line").

In December 1991, responding to the dumping accusations, officials of the Malaysian producers representing Heveafil, Rubfil, Rubberflex, and Filati Lastex met with a Malaysian government official and agreed to fix rubber-thread prices throughout the world. Later joined by other rubber-thread producers from Malaysia, Indonesia, and Thailand, they continued to meet for several years, at conventions and in other settings, to discuss and implement these and other efforts to fix prices. They met regularly between 1992 and 1995 -- in Kuala Lumpur, in Columbo, in Bali, and in Penang. They never met in the United States.

Throughout the period during which they met to fix prices, the Malaysian producers sold their rubber thread around the world, distributing it to the United States market in three different ways. Heveafil and Filmax sold to the United States through a division of Heveafil based in the United States. Rubfil, Rubberflex, and Filati Lastex all sold to large United States customers directly and to smaller customers through wholly owned subsidiaries incorporated in the United States, all four of which were named as defendants. *See Dee-K*, 982 F. Supp. at 1142. The record does not disclose the United States share of the global market.

From 1991 to 1996, United States prices for rubber thread (adjusted for inflation using the producer price index) generally rose, with some decreases on various scales. Dee-K attributes these increases to the price-fixing conspiracy. The producers attribute them to an antidumping order entered by the United States Department of Commerce in

1992 that imposed a duty on rubber thread and to increases in the price of raw materials, particularly the price of latex.

At the conclusion of an eight-day trial, the district court submitted a special verdict form to the jury. The verdict form included two questions: (1) Was there "a conspiracy . . . to fix the prices of extruded rubber thread, which was intended to have a substantial effect in the United States"? (2) If so, did "the conspiracy have a substantial effect in the United States"?

The jury answered the first question in the affirmative, finding a conspiracy to fix prices with the intent of affecting the United States. But the jury answered the second question in the negative, finding that the conspiracy did not have a substantial effect in the United States. In accordance with this verdict, the court entered judgment for the producers.

Dee-K moved for a new trial pursuant to Rule 59, arguing that the jury's verdict as to the lack of a substantial effect on United States commerce was contrary to the weight of the evidence. The district court denied the motion and simultaneously denied a late-filed Rule 50 motion for judgment as a matter of law on the substantial-effect question. Dee-K appeals, contending that the substantial-effect test (at least as stated in the jury instructions and special verdict) does not govern this case.[1]

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[1] Dee-K does not appeal the denial of its Rule 50 motion. It does, however, appeal the denial of its motion for a new trial, asserting that the jury's finding of no substantial effect was against the weight of the evidence. In fact, the producers provided the jury with a good deal of evidence supporting the challenged finding, including evidence that increased latex prices or antidumping duties, or both, accounted for rubber-thread price increases. Given these alternatives, nothing about this case presents the "exceptional circumstances" that might lead us to conclude that the verdict was against the weight of the evidence. *See*

(footnote continued on next page)

II.

In *Hartford Fire Insurance Co. v. California*, the Supreme Court noted that "it is well established that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." 509 U.S. 764, 796 (1993) (citations omitted).

Dee-K argues that this statement in *Hartford Fire* does not govern the case at hand, primarily because the price-fixing conspiracy it proved does not constitute "foreign conduct." Dee-K contends that instead the jurisdictional test used in domestic antitrust cases controls here; in domestic cases a plaintiff need only demonstrate "that the defendant's activity is itself in interstate commerce, or . . . that it has an effect on some other appreciable activity demonstrably in interstate commerce." *See McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 242 (1980) (emphasis added and citation omitted). Accordingly, Dee-K asserts that the district court abused its discretion by applying the substantial-effect test from Hartford Fire. *See Nelson v. Green Ford, Inc.*, 788 F.2d 205, 208-09 (4th Cir. 1986) (noting that we review jury instructions for abuse of discretion); *Tights, Inc. v. Acme-McCrary Corp.*, 541 F.2d 1047, 1060 (4th Cir. 1976) (noting that we review special verdict interrogatories for abuse of discretion).

The producers respond that *Hartford Fire* is "analytically indistinguishable" from Dee-K's case. Thus, they maintain that the district court correctly applied *Hartford Fire* when it

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(footnote continued from previous page)
Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp., 41 F.3d 182, 186 (4th Cir. 1994 (citation omitted); *see also Poynter v. Ratcliff*, 874 F.2d 219, 223 (4th Cir. 1989); *see generally* 11 Charles Alan Wright et al., *Federal Practice & Procedure* § 2819 (2d ed. 1995 & Supp. 2002).

required Dee-K to show a "substantial effect in the United States" before concluding that "the Sherman Act applies" to the "foreign conduct" that Dee-K alleged.

The mixture of foreign and domestic elements in this case makes its analysis challenging; either an entirely foreign or an entirely domestic conspiracy would present a comparatively easy jurisdictional question. If the conspiracy had involved participants with United States affiliations, acting only in the United States, and targeting a United States market, the jurisdiction of United States courts would be clear, without any proof of effect.[2] At the other extreme, if everything about the conspiracy were foreign -- if it were a conspiracy formed in Southeast Asia, by Southeast Asian persons and corporations, intended to affect only Southeast Asian markets, and affecting only those markets -- the Sherman Act would not provide a United States court any jurisdiction to address it. *See Matsushita Elec. Indus. v.*

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[2] We recognize that the Ninth Circuit has suggested that the foreign-conduct question affects the substantive analysis of a particular offense under the antitrust laws. *See Metro Indus. v. Sammi Corp.*, 82 F.3d 839, 844-45 (9th Cir. 1996). Although market effect of course has its place in substantive antitrust analysis, we follow the Supreme Court and Congress in treating allegations that an antitrust case involves only foreign conduct as raising a jurisdictional issue. *See* 15 U.S.C.A. § 6a (West 1997) (addressing the presence of certain types of foreign conduct in an antitrust case by providing that the Sherman Act does not apply to such cases at all); *Hartford Fire*, 509 U.S. at 795-96; *see also* Restatement (Third) of the Foreign Relations Law of the United States § 415, reporter's note 3 (1987) ("[A]ccurate analysis distinguishes between the requirement of sufficient effect on commerce of the United States to support application of United States law, and the requirement of sufficient injury or anticompetitive effect to establish liability."); Wilbur L. Fugate, *Foreign Commerce and the Antitrust Laws* § 2.14 at 16 (Supp. 2002) (criticizing the Metro Industries court on this point); IA Philip Areeda & Herbert Hovenkamp, Antitrust Law § 273 (2d ed. 2000) ("[W]e emphasize that 'jurisdictional' and 'substantive' inquiries are not wholly independent.").

Zenith Radio Corp., 475 U.S. 574, 582 (1986) ("American antitrust laws do not regulate the competitive conditions of other nations' economies.").

We earn our keep, of course, in the middle ground between such extremes -- in cases such as this. Dee-K alleged (and proved to the jury) a largely foreign conspiracy with some domestic elements, aimed at a global market including, but certainly not limited to, a United States import market. Indeed, the conspiracy mixed foreign and domestic elements in several respects: it included many *participants* with foreign affiliations but a few who also had United States affiliations; *acts* that range from a series of conspiratorial meetings, all held abroad, to routine communications, a few with the United States; and a *target market* embracing dozens of nations including the United States. This sort of mixed fact pattern will probably become increasingly familiar as global economic links and assertions of transnational jurisdiction increase. *See generally* Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 Sup. Ct. Rev. 289, 290-92. But this is one of the few cases to date that involves an import market and presents such a mixed fact pattern, and neither the statutory scheme nor the case law provides clear guidance.

Although the Supreme Court noted in *Hartford Fire*, 509 U.S. at 796, that the substantial-effect test applies to "foreign conduct," no antitrust statute defines "foreign conduct." Nor does any statute explicitly address any aspect of a case involving the effect of foreign conduct on United States *import* commerce, like that at issue here.

To be sure, Congress legislated in this area relatively recently, establishing a threshold jurisdictional standard for "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." Foreign

Trade Antitrust Improvements Act (FTAIA) of 1982 § 402, Pub. L. 97-290, 96 Stat. 1246 (codified at 15 U.S.C.A. § 6a). According to that statutory standard, United States antitrust laws do not apply to such conduct unless it has "a direct, substantial and reasonably foreseeable effect" on United States commerce. *Id.* Because this case involves importation of foreign-made goods, however -- conduct Congress expressly exempted from FTAIA coverage as "involving . . . import trade or import commerce . . . with foreign nations," *id.* -- the FTAIA standard obviously does not directly govern this case, even though it may constitute an effort to "clarify the application of United States antitrust laws to foreign conduct" in other circumstances.[3] *See Den Norske Stats Oljeselskap AS v. Heeremac Vof*, 241 F.3d 420, 421 (5th Cir. 2001); *Hartford Fire*, 509 U.S. at 796 n.23 (refusing to decide whether the FTAIA applies to the conduct alleged, an agreement between foreign and United States participants, formed abroad, to refuse to sell a service to United States consumers); *see also id.* (refusing to decide whether the FTAIA's "direct, substantial, and reasonably foreseeable effect" provision "amends existing law or merely codifies it"); *Kruman v. Christie's Int'l P.L.C.*, 284 F.3d 384, 399 n.5 (2d Cir. 2002) (same). Nor do we find any guidance in the FTAIA as to what constitutes "foreign conduct."

We thus must rely on case law, which provides some, albeit limited, assistance. Only a few cases give any hint of how to decide whether conduct is foreign.

In cases that date from the early twentieth century, silence on this point is hardly surprising, because the Supreme Court then rejected any exercise of jurisdiction based only on acts committed abroad, on the theory that the law of the country

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[3] Not even the producers suggest that we should, by analogy or otherwise, borrow the FTAIA standard in this import case.

where an act occurred should govern it. *See American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909); IA Areeda & Hovenkamp § 272b at 350-51 (describing post-American Banana Supreme Court cases in which jurisdiction depended on finding "actions within the United States").

In 1945, a leading opinion by Judge Learned Hand, which the Supreme Court later endorsed, displaced this approach based on the location of the conduct, and shifted attention to the location of the conduct's actual or intended effect. *See United States v. Aluminum Co.* (*Alcoa*), 148 F.2d 416 (2d Cir. 1945); IA Areeda & Hovenkamp § 272c; I Wilbur L. Fugate, *Foreign Commerce and the Antitrust Laws* § 2.10 at 68-69 (5th ed. 1996). The case, Alcoa, thus introduced a predecessor of Hartford Fire's effects test. Although Alcoa refocused the jurisdictional analysis on the location of the effects of alleged violations of the antitrust laws, it did not eliminate the location of the conduct from the inquiry entirely, since its test applied only to cases involving foreign conduct.[4] *See, e.g.*, *Kruman*, 284 F.3d at 393-94 ("Under [*Alcoa*'s] . . . 'effects test,' *foreign conduct* was actionable under our antitrust laws if it was intended to affect domestic commerce and actually did so." (emphasis added)). Yet *Alcoa* does not discuss how to assess whether conduct is "foreign," rather than domestic and therefore subject to *McLain*'s test.

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[4] After *Alcoa* as before, a wholly domestic antitrust case does not necessarily require any proof of an effect on commerce. *See, e.g.*, *Fed. Trade Commas v. Superior Ct. Trial Lawyers Assn*, 493 U.S. 411, 432-36 (1990) (expounding on the rationale for per se antitrust rules that create a presumption of effect in many cases); *McLain*, 444 U.S. at 242 (explaining that antitrust jurisdictional requirements in a domestic case may be satisfied by a showing that "the defendants' activity" of any magnitude "is itself in interstate commerce").

In the decades after *Alcoa*, courts and commentators analyzed not how to assess whether conduct is foreign, but how to interpret and apply *Alcoa*'s effects test. They disagreed as to whether antitrust jurisdiction over foreign conduct requires both "an effect" on United States commerce and an "intent to affect United States commerce," or just effect or just intent, and as to the magnitude of any effect. *See, e.g.*, *Matsushita*, 475 U.S. at 582 n.6 (characterizing the Sherman Act as "reach[ing] conduct outside our borders, but only when the conduct has an *effect* on American commerce") (emphasis added)); Restatement (Third) of Foreign Relations Law § 415 (concluding that the Sherman Act applies to a foreign-made agreement with "a principal purpose . . . to interfere with the commerce of the United States" and "some effect on that commerce" and to other foreign-made agreements with a "substantial effect" on United States commerce if "the exercise of jurisdiction is not unreasonable"); Fugate § 2.12 at 82 (proposing "the 'direct and substantial' [effect] test, plus an element of intent" where "U.S. jurisdiction is based upon acts or agreements abroad which are not in the flow of foreign commerce" (emphasis omitted)); *id.* § 2.5 at 56, § 2.8 at 62 (suggesting and citing authority for a requirement of a "substantial effect"); IA Areeda & Hovenkamp § 272a at 350, § 272f at 354 (describing a minimal requirement of "significant effects"); *see also Den Norske Stats Oljeselskap*, 241 F.3d at 423-24 & n.12 (describing the "general [ ] disagree[ment]," "assorted tests," and "confusing and unsettled" federal case law governing "the extraterritorial reach of the antitrust laws" before (and after) *Hartford Fire*. In promulgating these variants on the effects test, however, the authorities do not explore how to define "foreign conduct" in deciding whether to apply an effects test at all.

Although *Hartford Fire* itself does not discuss how to define "foreign conduct" either, it gives us some guidance by characterizing certain conduct as foreign. The complaint in *Hartford Fire* alleged multiple, partially overlapping conspiracies among reinsurers and their insurers (that is, insurers of reinsurers, also known as providers of retrocessional insurance) to limit the kinds of policies written for general corporate coverage in the United States market. *See* 509 U.S. at 770-78. Three counts specifically alleged that companies in London agreed among themselves to refuse to reinsure policies covering the United States market unless the policies contained certain restrictions on liability. Two of these alleged conspiracies involved only international participants, *see id.* at 776, 778 & n.7, but one involved both international and United States participants. *See id.* at 775-77.

It was in its discussion of these three counts that the *Hartford Fire* Court stated that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." 509 U.S. at 796. The Court thus plainly characterized the three counts it was then considering (including the count involving conspirators based in the United States) as "foreign conduct," but did not further define the term. The Court did not explain whether or how it had weighed the national affiliation or affiliations of the violators, the location of their acts, the location of the target market, or some combination of these factors in determining that the counts involved "foreign conduct."[5]

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[5] Nor, as Dee-K notes, did the Court resolve whether the Sherman Act might also apply to foreign conduct (however defined) that meets some lesser standard -- that is, whether intent alone, substantial effect alone, or some "effect" less than "substantial" coupled with intent might suffice.

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Dee-K seeks to rely on the *Hartford Fire* Court's silence on these issues to argue that it need not satisfy the substantial-effect test described in *Hartford Fire*. Specifically, Dee-K maintains that, even if the *Hartford Fire* statement does set forth minimal requirements for antitrust jurisdiction over foreign conduct, those requirements govern only antitrust violations involving "wholly" foreign conduct -- and do not govern foreign conspiracies that result in the sale of price-fixed goods directly into United States commerce. Meanwhile, the producers argue that *Hartford Fire* directly controls here, without acknowledging any distinctions between the two cases. They insist that the only relevant consideration in assessing whether conduct is foreign is the location of actual conspiratorial meetings. We

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Instead, the Court stated that the Sherman Act *does* apply to foreign conduct when intent and substantial effect exist, without explicitly excluding the possibility of jurisdiction in other circumstances. 509 U.S. at 796; *see also* IA Areeda & Hovenkamp § 273. (Indeed, the parties presented no jurisdictional issue to the Court in *Hartford Fire*; rather, the defendant reinsurers "concede[d] "jurisdiction, but contended that "the District Court should have declined to exercise such jurisdiction under the principle of international comity." 509 U.S. at 795-97.)

However, we need not decide whether the *Hartford Fire* formulation is the only test for jurisdiction in antitrust cases involving foreign conduct, because Dee-K has waived this argument by failing to pursue it in the district court. Dee-K now contends that the district court should have applied a test drawn from the Restatement (Third) of Foreign Relations Law § 415(2), permitting a lesser effects test if the intent to affect the United States was a "principal purpose" of the conduct -- but Dee-K never so much as mentioned a "principal purpose" requirement in the district court, nor objected to the jury instructions or special verdict form on this basis. Never having proposed its theory or alternative test to the district court, Dee-K cannot prevail on this argument on appeal.

ultimately reject both sides' rigid views of Hartford Fire and apply a more nuanced analysis.

A.

We begin with Dee-K's contention that the standard set forth in *Hartford Fire* does not govern this case because the conduct at issue here is not foreign enough. Dee-K offers two arguments in support of this contention. Neither is persuasive.

First, Dee-K relies on the fact that two of our sister circuits have characterized *Hartford Fire* as involving "wholly foreign" conduct. *See Carpet Group Intl v. Oriental Rug Importers Assn*, 227 F.3d 62, 75 (3d Cir. 2000); *United States v. Nippon Paper Indus.*, 109 F.3d 1, 9 (1st Cir. 1997). Dee-K maintains, in line with this characterization, that *Hartford Fire* does not govern a conspiracy like that at hand, with some domestic elements, including direct sales into the United States and one or more participants based in the United States (here the United States subsidiaries and distributors of the producers). Dee-K does not specify whether it is the nationality of the participants involved in the alleged antitrust violation, the location of their acts, the nature of their target market, or some combination of these factors that must be foreign to render their conduct "wholly foreign."

The *Carpet Group* and *Nippon Paper* courts did not state or suggest the origin of the phrase "wholly foreign." A possible source for the phrase is the legislative history of the FTAIA, the 1982 statute that required "a direct, substantial and reasonably foreseeable effect" on United States commerce for antitrust jurisdiction over conduct involving non-import foreign commerce. *See* 15 U.S.C.A. § 6a(1); H.R. Rep. No. 97-686, at 10 (1982), *reprinted in* 1982

U.S.C.C.A.N. 2487, 2495. A House Report explained that the FTAIA covers "wholly foreign transactions as well as export transactions" but not "import transactions." *Id.* In the FTAIA's legislative history, then, "wholly foreign transactions" appear to be those conducted entirely outside the United States -- transactions that have no point of contact with this country. *See also In re Ins. Antitrust Litig.*, 723 F. Supp. 464, 486 (N.D. Cal. 1989) (characterizing the FTAIA as applicable to "wholly foreign commerce") (subsequent history, culminating in Hartford Fire, 509 U.S. 764, omitted). If this legislative history indeed constitutes the source of the phrase "wholly foreign," the history itself makes plain that the phrase does not apply to cases like ours, which involve "import transactions." Dee-K derives little benefit, however, from this possible origin of the phrase, because based on the legislative history, "wholly foreign" cannot be an appropriate characterization of the transactions at issue in *Hartford Fire* itself -- which involved a refusal to sell to United States consumers. Thus, if the FTAIA's legislative history is the source of the term "wholly foreign," a court certainly should not use the term in deciding whether to apply the *Hartford Fire* test.

Carpet Group and *Nippon Paper*'s characterization of *Hartford Fire* as involving "wholly foreign" conduct may, however, simply have been a shorthand description of the case, for in neither *Carpet Group* nor *Nippon Paper* does the holding turn on this characterization or otherwise assist Dee-K. Indeed, the analysis of the Third Circuit in *Carpet Group* is directly contrary to that suggested by Dee-K. The Third Circuit did refuse to apply the *Hartford Fire* test to a conspiracy among United States and foreign entities to protect the role of distributors in the United States market for imported carpets. However, the *Carpet Group* court did not simply point to the existence of some domestic contacts and

end its analysis, as Dee-K would have us do. Rather, before applying the *McLain* domestic-conduct jurisdictional standard, the Carpet Group court determined that the alleged conduct "deal[t] primarily with conduct in the United States," because of the United States location of most participants, several targets of their pressure, and several of their meetings. 227 F.3d at 64-68, 75. Thus, looking at participants' affiliations and the locations of both acts and targets, the court focused on whether the conduct at issue was "primarily" domestic or foreign, not whether it was "wholly" domestic or foreign.

Furthermore, and perhaps most importantly, characterization of a prior case by a lower court cannot revise or amend the case's language or facts. Hence, even if *Carpet Group* or *Nippon Paper* had held that Hartford Fire controlled only "wholly foreign" conduct, that could not change the language or facts of Hartford Fire itself. In *Hartford Fire*, although the district court had used the term "wholly foreign" in a related context, *see In re Ins. Antitrust Litig.*, 723 F. Supp. at 486, the Supreme Court *never* described the conduct before it as "wholly" foreign. Moreover, some of the participants in one of the conspiracies alleged in *Hartford Fire* were entities based in the United States, *see* 509 U.S. at 775, 776, 795, all of the London-based corporate defendants were "subsidiaries of American corporations," and at least one key meeting attended by London-based defendants occurred in New York City. *See In re Ins. Antitrust Litig.*, 938 F.2d 919, 922-23, 929 (9th Cir. 1991), *rev'd on other grounds sub nom. Hartford Fire*, 509 U.S. 764. Thus, *Hartford Fire* itself severely undercuts Dee-K's claim that the substantial-effect test applies only to "wholly" foreign conduct, and Dee-K has shown no other reason to limit Hartford Fire to such conduct. *But see* IA Areeda & Hovenkamp § 272e at 354 (hypothesizing that the

Sherman Act might reach even conduct with "only remote[ ] and insignificant[ ]" effects on the United States and no intent to affect the United States if "American firms participate" or "some planning or other conduct" occurs here).

Dee-K's other foreign-conduct argument, although reiterated several times, fares no better. Dee-K repeatedly contends that whenever conspirators "sell price-fixed goods directly into U.S. commerce," the conspiracy must be regarded as domestic rather than foreign conduct, because these goods by definition are then "in" United States commerce. This single-factor test -- under which even a conspiracy hatched and planned entirely on foreign soil by foreign entities would be domestic if it resulted in direct sales of price-fixed goods into a United States import market -- comes perilously close to clear conflict with *Hartford Fire*. After all, there the Supreme Court characterized as "foreign conduct" a conspiracy to refuse to sell reinsurance policies directly into United States markets. The Hartford Fire conspiracy had a direct, anticompetitive impact on a United States import market -- just like the direct anticompetitive impact that Dee-K attributes to the rubber-thread price-fixing conspiracy.

Dee-K apparently hopes to distinguish *Hartford Fire* simply because that case concerned a *refusal* to sell to, rather than a sale to, purchasers in the United States. We acknowledge that in some circumstances this factual distinction may have significance.[6] When we consider actual

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[6] The *Hartford Fire* Court specifically declined to decide whether the FTAIA governed a refusal to sell a service into the United States, even though the lower courts had held that the FTAIA did not apply to such conduct. *See In re Ins. Antitrust Litig.*, 723 F. Supp. at 486, *affd on this ground*, 938 F.2d at 932, *rev'd on other grounds sub nom. Hartford Fire*,

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harm to United States consumers, however, we see no distinction between the impact of refusing to sell and that of fixing the price of imported goods, both of which may seriously and directly harm United States consumers. Both situations involve harmful conduct affecting a transaction in which a United States participant takes place.

In refusal cases, courts have not hesitated to require antitrust plaintiffs to allege and prove a substantial effect on the United States. In addition to the *Hartford Fire* Court itself, the Ninth Circuit required such proof in a case involving allegations that competitors had divided up the right to sell directly to United States consumers, even though market division rings the same alarm bells as price fixing; indeed, both constitute *per se* Sherman Act violations. *See Metro Indus.*, 82 F.3d at 841, 843-44.

Moreover, given complex global trade patterns of sale, resale, and distribution, Dee-K's formulation would grant United States courts jurisdiction over a great variety of foreign conduct. *Cf. Den Norske Stats Oljeselskap*, 241 F.3d 420 (rejecting the existence of any form of antitrust jurisdiction over a foreign conspiracy even though it assertedly indirectly raised prices in a United States import market, in part because the plaintiff was not a buyer or seller in that market). For example, in every case involving direct sales to the United States in which our antitrust laws condemn an activity *per se*, however foreign the conduct, United States courts would have jurisdiction without any showing whatsoever of an effect on United States commerce.

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509 U.S. at 796 n.23 (taking no position on the applicability of the FTAIA). Perhaps the Court declined to decide the issue because a refusal to sell a service into the United States does not 'enter' the United States in some sense, as an import does.

See, e.g., *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 903 F.2d 988, 995 (4th Cir. 1990) (noting that explicit horizontal minimum price fixing is a *per se* violation of the Sherman Act). Yet the rationale for *per se* rules in cases addressing domestic conduct seems plainly "inapplicable to foreign restraints that . . . pose very little danger to American commerce." IA Areeda & Hovenkamp § 273 at 370-71 (noting that "price fixing in a foreign country might have some but very little impact on United States commerce," and concluding that "appraising restraints abroad requires an assessment of effects on American foreign commerce").

Perhaps for this reason, courts have consistently required a showing of effect on United States commerce even in cases involving price fixing on imports. Before *Hartford Fire*, the Seventh Circuit considered a conspiracy among "twenty domestic and nine foreign corporations . . . to fix the price of uranium in the world market" at meetings in five foreign countries and the United States. *See In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1254 (7th Cir. 1980). In that case the Seventh Circuit applied Alcoa's effects test, although the domestic participants greatly outnumbered the foreign participants, a meeting occurred in the United States, and the target market included the United States. *See id.*, at 1253-54. Similarly, in *Nippon Paper*, on which Dee-K heavily relies, the First Circuit had no trouble treating a criminal conspiracy resulting in price fixing of goods imported into the United States as "foreign conduct" requiring proof of a substantial effect on United States commerce. *Nippon Paper*, 109 F.3d at 2.[7]

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[7] The *Nippon Paper* court stated that the Sherman Act treated civil and criminal jurisdiction alike and then extended criminal jurisdiction by applying the *Hartford Fire* test from the civil context. *See* 109 F.3d at 4-8. Dee-K seeks to distinguish *Nippon Paper* on the ground that it

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Finally, the Executive Branch has endorsed the view that plaintiffs alleging antitrust violations affecting imports into a United States market must still prove a substantial effect on United States commerce. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* § 3.11 (1995), available at http://www.usdoj.gov/atr/public/guidelines/internat.htm (as of July 2, 2002) (advising that "[i]mports into the United States by definition affect the U.S. domestic market directly" but that they yet must "produce the requisite substantial effects," while commenting that effects are likely to be "clear" in such a case).

For these reasons, we reject Dee-K's contention that Hartford Fire never applies when a conspiracy involves price-fixed goods sold directly into United States commerce.

B.

We likewise reject the producers' equally rigid view as to the applicability of *Hartford Fire*. The producers contend that in assessing whether "conduct" is "foreign" (and thus subject to the substantial-effect, rather than the domestic

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involved goods not directly sold into the United States market by the price-fixers themselves. However, Dee-K can point to no authority applying per se condemnation to foreign price fixing simply because the price fixing was on directly imported goods. Moreover, nothing in *Nippon Paper* suggests that the corporate layer between the price-fixers and the United States market protected the price-fixers from full domestic treatment, *i.e.*, that the case might have been analyzed as domestic conduct if the price-fixing scheme had not been indirect. Indeed, the commentators see *Nippon Paper* as novel, not because it applied an effects test as a prerequisite for jurisdiction, but because it asserted jurisdiction at *all* in a criminal context. *See* Fugate § 2.14 at 14, 15 (Supp. 2002); IA Areeda & Hovenkamp § 272i at 364-68.

McLain test), we should consider only the location of acts that themselves independently violate the Sherman Act. According to the producers, "the *Hartford Fire* test . . . is based solely upon the situs of a conspiratorial agreement." The producers thus turn Dee-K's argument back upon it: even if *Hartford Fire* does apply just to "wholly foreign conduct," the only relevant "conduct" is the conspiratorial meetings themselves. In this case, they argue, we should therefore focus only on the location of the meetings at which the conspirators agreed to fix prices -- and all of those meetings were held outside the United States.

The producers' suggested rule eliminates any examination of the national affiliation of the participants in the conduct, the scope and location of the target market, and the location of all acts other than the actual conspiratorial acts. This rigidity troubles us. A noted commentary has warned against an overly rigid approach in this area of antitrust law: "to say that domestic *per se* rules are not necessarily and automatically applicable in the international context is not to say that an antitrust court needs to hesitate very long before condemning restraints with significant and obvious effects on United States commerce, and without any plausible purpose other than the suppression of competition with and in the United States." IA Areeda & Hovenkamp § 273 at 371. In short, the flexibility that permits a court not to apply domestic rules to a defendant engaging in foreign conduct should be balanced by a court's ability to allow a plaintiff to pursue foreign conduct that does harm United States interests -- even if the defendants scrupulously entered into their illegal agreements only outside the United States.

The suggestion that we consider only the location of certain acts concerns us particularly given that ever since *Alcoa*, the Supreme Court's jurisdictional analysis has emphasized above all else the effects, *i.e.*, the intended

location, actual location, and magnitude of those effects. *See, e.g.*, *Kruman*, 284 F.3d at 395. Quite simply, the Supreme Court has moved away from its earlier doctrine focused solely on the location of acts. We therefore doubt whether a jurisdictional rule focused exclusively on defining and locating a certain limited set of acts could possibly be appropriate.

The potential consequences of the rule that the producers champion only confirm our doubts. If, for example, executives of United States corporations that did business solely in the United States met abroad simply to consummate a price-fixing conspiracy that was carried out entirely within the United States, the producers' proposed rule would still require special proof of the conspiracy's effect before a United States court could assert jurisdiction.

We reject this overly narrow view. *McLain* might well apply to such a conspiracy, even though the acts that constituted the illegal agreement took place exclusively abroad. Conversely, as the Second Circuit has noted, meetings in the United States to negotiate "an agreement to fix prices in an overseas foreign market that had no effect on domestic commerce" do not yield antitrust jurisdiction in our courts. *See Kruman*, 284 F.3d at 395. The universe of factors relevant to our jurisdictional analysis must be greater than the location of the specific conspiratorial acts alone.

C.

Instead of the parties' bright-line rules, we believe a court should properly engage in a more flexible and subtle inquiry. In determining which jurisdictional test (*Hartford Fire* or *McLain*) applies, a court should consider whether the participants, acts, targets, and effects involved in an asserted

antitrust violation are primarily foreign or primarily domestic.

This inquiry will best accommodate the cases with mixed fact patterns, defying ready categorization as "foreign" or "domestic" conduct, which our increasingly global economy will undoubtedly produce. We cannot begin to foresee the scope or complexity of future transactions. To adopt the simplistic rules the parties favor might well yield unintended and unfortunate results.

Moreover, this area of antitrust law has historically been marked by change, and remains a subject of serious debate. Not only the courts, but also numerous commentators and even representatives of various other countries (as frequent amici), have presented differing views, focusing on various elements of conduct as crucial in addressing whether assertion of jurisdiction is appropriate. Given these concerns, we believe courts should remain able to consider the full range of factors that may appropriately affect the exercise of our antitrust jurisdiction in any given case.

We note that this approach echoes that of the Third Circuit in *Carpet Group* and finds support in several of the treatises. *See Carpet Group*, 227 F.3d at 75; Fugate § 2.12 at 80-82 (discussing the location of "acts and agreements," the location of their effects, and the nationality of participants in considering jurisdiction); Restatement (Third) of Foreign Relations Law § 415(2) (applying the same proposed jurisdictional test to "[a]ny agreement in restraint of United States trade that is made outside of the United States, and any conduct or agreement in restraint of such trade that is carried out predominantly outside of the United States" (emphasis added)); *cf. Montreal Trading Ltd. v. Amax, Inc.*, 661 F.2d 864, 849 (10th Cir. 1981) ("When the contacts with the United States are few, the effects upon American

commerce minimal, and the foreign elements overwhelming . . . we do not accept jurisdiction.").

In this case, the bulk of the conduct related to the global conspiracy alleged in the complaint and proved at trial occurred abroad. As in *Nippon Paper*, the agreements here were all formed entirely outside the United States -- in several other countries. The target of the conspiracy was a global market, and the participants monitored prices in many markets around the world. Although dozens of people participated in the meetings over the years, Dee-K can only point to two who held office in United States companies, and both of them also had important and in fact primary roles in Southeast Asian companies.

To be sure, the producers sold rubber thread in the United States to United States consumers. In particular, Heveafil sold through a United States division of the parent producer, directing pricing by communications from Southeast Asia, while Rubfil sold through a wholly owned United States subsidiary and co-defendant. In addition, a handful of faxes from the producers describe pricing in the United States. It further appears that a United States distributor was made aware, by a fax sent "FYI," of a group commitment not to hire an executive whom one producer had fired for his opposition to price increases.

But these links to the United States are mere drops in the sea of conduct that occurred in Southeast Asia (and around the world). *See In re Uranium Antitrust Litig.*, 617 F.2d at 1254 (applying *Alcoa*'s effects test in a price-fixing case even though twenty participants were domestic and only nine foreign and the United States was part of the target market). Just as the Third Circuit looked at a mass of conduct and concluded it was "primarily" domestic in *Carpet Group*, 227 F.3d at 75, so examining all of the conduct here, we can only conclude that it is primarily foreign. The handful of contacts

with the United States that Dee-K cites cannot change the fact that the rubber-thread conspiracy was formulated and furthered at numerous meetings, all of which took place in Southeast Asia, with attendees, all of whom worked for Southeast Asian firms, and who directed their activity to the global market. Only a few of the participants had any United States affiliation, and each of those also had a primary Southeast Asian affiliation. In addition, although we have explained that we do not find this factor alone dispositive, we consider it significant that not one of the conspirators' many meetings took place in the United States. In light of all of these factors, we conclude that the price-fixing conspiracy Dee-K alleged and proved was primarily "foreign conduct" to which the *Hartford Fire* test properly applied.

In closing, we note that even when a conspiracy constitutes "foreign conduct," an antitrust plaintiff still has access to the federal courts to challenge it. The district court did not dismiss Dee-K's lawsuit because its claim involved foreign conduct. The court merely required Dee-K to prove that the foreign conduct had a substantial effect on United States commerce in order to recover. Other litigants who claim that foreign conduct, which violates our antitrust laws, has harmed them may also have their day in court, and the federal courts will provide redress for those who can show that the harm of which they complain had a substantial effect on our commerce. For Dee-K, that day in court has come and gone.

IV.

For the reasons given herein, the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:98-CV-10-MU
3:99-CV-161-MU

DEE-K ENTERPRISES, INC., et al.,	)	
Plaintiffs,	)	
v.	)	
HEVEAFIL SDN.BHD, et al.,	)	
Defendants.	)	
	)	ORDER
DEE-K ENTERPRISES, INC., et al.,	)	
Plaintiffs,	)	
v.	)	
Pt. BAKRIE SUMATERA PLANTATIONS, et al.,	)	
Defendants.	)	

THIS MATTER is before the Court upon Plaintiffs' Motion for a New Trial or Judgment as a Matter of Law, filed April 6, 2001, Defendants' Response, filed May 4, 2001, and Plaintiffs' Reply, filed May 14, 2001.

A jury trial was held in this matter during March, 2001, Plaintiffs request a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. A motion for a new trial under Rule 59(a) should be granted if (1) the verdict is against the clear weight of the evidence, (2) is based upon evidence which is false, or (3) will result in a miscarriage of

justice. *See Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996).

The Court does not believe that Plaintiffs are entitled to a new trial. The *Hartford Fire* jury instructions were warranted and in accordance with the law. Plaintiffs were required to show that the conspiracy had a substantial effect in the United States. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) ("[T]he Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.") The jury found that Plaintiffs failed to meet their burden, and this finding is not against he clear weight of the evidence, is not contrary to law and does not amount to a miscarriage of justice.

As an alternative to its motion for a new trial, Plaintiffs ask this Court for judgment as a matter of law on the second jury issue.[1] The Defendants argue that Plaintiffs failed to move for judgment as a matter of law at the close of all the evidence; therefore, Plaintiffs are precluded from requesting a judgment as a matter of law in a post-trial motion. The Court agrees.[2] *See Harrison v. Edison Bros. Apparel Stores, Inc.*, 814 F. Supp. 457, 461 n.8 (M.D.N.C. 1993) ("[A] federal district court is precluded from entertaining a motion for judgment as a matter of law unless the movant has first

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[1] The first jury read, "Was there a conspiracy, involving one or more of the Defendants, to fix the prices of extruded rubber thread, which was intended to have a substantial effect in the United States?" The jury responded in the affirmative. The second jury issue asked, "Did the conspiracy have a substantial effect in the United States?" The jury indicated a negative response.

[2] Mindful of this requirement, the Court asked the Defendants if they intended to renew their motion under Rule 50(b). The Court then asked if there was anything for the Plaintiffs. Counsel for the Plaintiffs responded, "No."

sought a judgment as a matter of law after all of the evidence.").

Plaintiffs attempt to argue that a "post-trial attack on one of multiple special verdicts, especially one based on legal grounds, is not subject to the requirement of a previous Rule 50 motion." Plaintiffs' Reply at 3. Plaintiffs are wrong and the cases cited by Plaintiffs do not support this statement.[3] The general rule remains that a party may move for judgment as a matter of law after the verdict, only if the party earlier moved for a judgment as matter of law at the close of the evidence.

Even if Plaintiffs' motion for judgment as a matter of law had not been waived, the Court would deny it. The motion can only be granted "if, viewing the evidence most favorable to the non-moving party and drawing every legitimate inference in that party's favor, [it is determined that] the only conclusion a reasonable trier of fact could draw from the evidence is in favor of the moving party." *Tools USA & Equip. Co. v. Champ Frame Straightening Equip., Inc.*, 87 F.3d 654, 656-57 (4th Cir. 1996) (citations omitted). The

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[3] For example, Plaintiffs cite *Traders and General Ins. Co. v. Mallitz*, 315 F.2d 171, 175 (5th Cir. 1963). That case is inapplicable to the present controversy. In that decision, the court was asked to consider whether or not the judgment was the proper judgment in light of the jury's responses. *See id.* ("Here, the question is not as to the sufficiency of the evidence, but as to the proper judgment to be entered upon the special verdict."). In this case, Plaintiffs attempt to argue that the jury's answer to the second issue was "contrary to the clear weight of the evidence." Plaintiffs' Memorandum at 2.

Plaintiffs also cite *Pierce v. Southern Pac. Transp. Co.*, 823 F.2d 1366, 1370 (9th Cir. 1987). In that case, the Court found that the motion for JNOV (now judgment as a matter of law) "did not allege defects in proof, but rather inconsistencies in the answers given in the special verdict." *Id.* at 1369. As discussed above, Plaintiffs attempt to argue that the jury verdict is contrary to the clear weight of evidence. Plaintiffs are precluded from making this argument.

Court is thoroughly convinced that, after viewing the evidence in the light most favorable to the Defendants, a reasonable jury could answer the second issue in the negative.

IT IS THEREFORE ORDERED that Plaintiffs' Motion is DENIED.

This the 4th day of June, 2001.

/s/
CHIEF UNITED STATES
DISTRICT JUDGE
GRAHAM C. MULLEN

APPENDIX C

United States District Court
For the Western District of North Carolina
Charlotte Division

DEE-K ENTERPRISES, INC.
and ASHEBORO ELASTICS CORP.,
Plaintiffs,

v.

HEVEAFIL SDN BHD., et al.,
Defendants.

Civil Action
No. 3:98-CV-10 MU

CONSORTIUM INTERNATIONAL CORP.,
Cross-claimant,

v.

HEVEAFIL SDN BHD., et al.,
Cross-claim Defendants.

ORDER DIRECTING ENTRY OF JUDGMENT

In accordance with the jury verdict duly rendered on March 14, 2001, the Court hereby orders the Clerk to enter judgment as follows: (i) awarding judgment in favor of Defendants Heveafil Sdn. Bhd., Filmax Sdn. Bhd., Filati Lastex Elastofibre USA, Inc., Rubfil Sdn. Bhd. and Rubfil USA, Inc., (ii) stating that Plaintiffs shall take nothing from these Defendants, and (iii) dismissing all claims against these Defendants on the merits with prejudice. Under Rule 54(b) of the Federal Rules of Civil Procedure, the Court determines that there is no just reason for delay and directs the entry of judgment on these terms.

The parties retain all rights to make appropriate filings with respect to costs and attorneys' fees under Rule 54(d) and Local Rule 54.1.

Dated; March 26, 2001
Charlotte, North Carolina

/s/
Graham C. Mullen
Chief United States
District Judge

APPENDIX D

**IN THE UNITED STATES COURT OF APPEALS
FOR THE WESTERN DISTRICT OF NORTH
CAROLINA
CHARLOTTE DIVISION**

DEE-K ENTERPRISES, INC.,
et al.,
Plaintiffs,
v. Case No. 3:98-CV-10-MU
HEVEAFIL SDN. BHD.,
et al.,
Defendants - Appellees.

DEE-K ENTERPRISES, INC.,
et al.,
Plaintiffs,
v. Case No. 3:99-CV-161-MU
PT. BAKRIE SUMATERA
PLANTATIONS, et al.,
Defendants.

VOLUME VII

Jury Trial before the HONORABLE GRAHAM C. MULLEN, Chief Judge, for the Western District of North Carolina, held in Courtroom 3, at the U.S. Courthouse, 401 West Trade Street, Charlotte, North Carolina, before Dennis Zambataro, Certified Court Reporter, on March 13, 2001, commencing at 9:00 a.m.

On behalf of the Plaintiff:

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On behalf of the Defendant:

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MR. CURRAN: [for Heveafil et al.] ....Something along the lines of: Was there a conspiracy involving one or more of the defendants intended to have a substantial effect in the United States?

Again, I guess there has to be some reference to extruded rubber thread.

Was there a conspiracy involving one or more of the defendants to fix the prices of extruded rubber thread --

THE COURT: Intended to have a substantial effect in the United States.

MR. CURRAN: Yes, Your Honor.

THE COURT: Okay. No problem.

MR. BRADY: [for Dee-K and Asheboro] Your Honor, we object to the use of the terms "substantial effect" in any of the jury instructions.

THE COURT: Because you have indicated an objection the *Hartford Fire* case?

MR. BRADY: That's correct, Heveafil, the Malaysian company, had a presence in the United States during the time of the conspiracy alleged.

THE COURT: Nice try. I disagree. I [do not [sic]] distinguish *Hartford Fire*. I find it is the controlling law in this case, and we will proceed on that basis.

Of course, I understand that all of you have the right to appeal – and I encourage all of you to do so. I have a responsibility to the county of Richmond, Virginia, and all of these people employed by the Fourth Circuit to oversee the operations of this Court, and I'm proud to provide them with continued employment.

MR. BRADY: ....Your Honor. May we make reference to the objections we raised at this conference this morning.

THE COURT: That is my understanding, you may refer or renew the objection to the Court's instruction on page 18.

MR. BRADY: Yes.

* * *

THE COURT: "Charge and Summaries," page 19, use of depositions, page 20.

"Direct and Circumstantial Evidence," page 21.

"Elements of Defense," page 22.

MR. BRADY: Plaintiffs object, Your Honor.

THE COURT: Again renewing your objection on *Hartford Fire.*

MR. BRADY: That is correct.

We would also ask that if the substantial effect instruction be given to the jury that at that time jury also be instructed that the substantial effect can be easily demonstrated, *Nippon Paper*, 62 Fed. Sup. 2nd at 195 gave three examples.

* * *

MR. BRADY: That substantial effect can be easily met. Three examples, number one, by more than a *de minimus* volume of Commerce.

THE COURT: I'm going to deny your objection on that, and give it like it is....

THE COURT: I will now ask counsel for both sides, are there any objections to the charge? You may take the case and see how you will find.

A JUROR: Do we take our books?

THE COURT: Yes, you may take all of your exhibits, notebooks, whatever you've got there.

THE CLERK: The boxes?

THE COURT: Go get them.

(Thereupon, the jury left the courtroom)

THE COURT: All right, for the Plaintiff, do you have any objections you wish to renew?

MR. DAVIDOW: Plaintiffs renew their objections under rule 51 to the Court's jury instructions for reasons given at this point in its change conference, and, specifically, the instructions on pages 18, 22, 23, 25, 27, 28, 29, 31, 32, 33.1, 35, 36, 37, 39, 40, 41, 47, 50 and 51.

Also Plaintiffs object to the Court's failure to give Plaintiff's proposed instructions, numbers 6, 25, 35, 37, 44, and 45.

THE COURT: Thank you, sir, for being so succinct. Anything for the defense?